Supreme Court, U.S.
FILED
APR 10 2007
OFFICE OF THE CLERK

(4)

No. 06-1050

# In the Supreme Court of the United States

LISA BURKE, MICHAEL CARPER, Individually and on Behalf of All Others Similarly Situated,
*Petitioners*,

v.

UTAH TRANSIT AUTHORITY, JOHN INGLISH, Individually, LOCAL 382 OF THE AMALGAMATED TRANSIT UNION and the UNITED STATES DEPARTMENT OF LABOR,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITIONERS' REPLY BRIEF

DANIEL G. MOQUIN
*Counsel of Record*
P.O. BOX 2802
TUBA CITY, AZ 86045
(801) 671-1806

*Counsel for Petitioners*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## TABLE OF CONTENTS

**Page(s)**

Table of Authorities . . . . . ii

I. RESPONDENTS IGNORE THE FUNDAMENTAL UNFAIRNESS OF CREATING A NEW LEGAL STANDARD FOR SUMMARY JUDGMENT AFTER PETITIONERS HAD FILED THEIR SUMMARY JUDGMENT RESPONSE . . . . . 1

II. RESPONDENTS COMPLETELY IGNORE THAT PETITIONERS MADE A TIMELY RULE 56(F) MOTION THAT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT . . . . . 6

CONCLUSION . . . . . 10

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Addington v. Farmer's Elevator Mutual Co.*,
650 F.2d 663 (5th Cir. 1981) . . . . . 7

*Agostino v. Ellamar Packing Co.*,
191 F.2d 576 (9th Cir. 1951) . . . . . 7

*Baltimore Sun v. National Labor Relations Board*,
257 F.3d 419 (4th Cir. 2001) . . . . . 2, 3

*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) . . . . . 2

*Chas S. Winner, Inc. v. Teamsters Local Union No. 115*,
777 F.2d 861 (3rd Cir. 1985) . . . . . 5

*City of Timberlake v. Cheyenne River Sioux Tribe*,
10 F.3d 554 (8th Cir. 1993) *cert denied*,
512 U.S. 1236 (1994) . . . . . 8

*Cohen v. Curtis Publishing Co.*,
333 F.2d 974 (8th Cir.) *cert. denied*
380 U.S. 921 (1965) . . . . . 7

*Conley v. Gibson*, 355 U.S. 41 (1957) . . . . . 9, 10

*Foman v. Davis*, 371 U.S. 178 (1962) . . . . . 8, 9, 10

*Intern. Ass'n of Machinists v. N.L.R.B.*,
759 F.2d 1477 (9th Cir. 1985) . . . . . 4

*International Brotherhood of Electric Workers v. Aubrey, Jr.*,
42 Ca. App. 4th 861
(Ct. App. 2nd Appellate Dist., Div. 4 1996) . . . . . 3

*Mosier v. Federal Reserve Bank of New York*,
132 F.2d 710 (2nd Cir. 1942) . . . . . 7

*NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) . . . . . 8

*NLRB v. Paper Manufacturers*,
786 F.2d 1163 (3rd Cir. 1986) . . . . . 5

*N.L.R.B. v. Stevens Ford, Inc.*,
773 F.2d 468 (2d Cir. 1985) . . . . . 4, 5

**Rules**

Fed. R. Civ. P. 56(f) . . . . . 6

**Statutes**

49 U.S.C. § 5333 (b) [Section 13 (c) (2) (B) of the Urban Mass Transportation Act] . . . . . 9

# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners Burke and Carper respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## I. RESPONDENTS IGNORE THE FUNDAMENTAL UNFAIRNESS OF CREATING A NEW LEGAL STANDARD FOR SUMMARY JUDGMENT AFTER PETITIONERS HAD FILED THEIR SUMMARY JUDGMENT RESPONSE.

Respondent UTA seeks to avoid addressing the unfairness of altering the standard for determining whether a question of material fact exists for summary judgment by falsely asserting that: "Petitioners never properly raised to the lower courts the specific 12-factor test." (UTA Resp. at p.11.) Of course, before the United States Supreme Court has the record before it such claims are difficult to refute. However, the Court has before it the En Banc petition. (Pet. App. 54a-68a.) Within the En Banc petition, the twelve factor test, (also called the "community of interest test") is clearly identified. *(Id.* at 62a.) The En Banc petition also states that: "The test and the Appellants' response to summary judgment, briefly demonstrating the suitability of the TRAX only bargaining unit was provided to the Panel as an exhibit." (*Id.* at 62a-63a.) The record will demonstrate that the twelve factor test was clearly presented to the district and Tenth Circuit courts both in written filings and oral argument.

The En Banc petition also demonstrated the factors which precluded summary judgment. (*Id.* at 63a-64a.) These factors were identified before the district court and affidavits supporting them were provided both to the district and Tenth

Circuit courts. If the Court grants Certiorari and reviews the record it will see that the issue was clearly raised below and evidence was provided to the district court despite the district court denying the petitioners all discovery. Moreover, since the Tenth Circuit Court heard a combined appeal from both a denial of an injunction (05-4079) and the granting of summary judgment (05-4222) the Court should request the entire record.

The movant for summary judgment, respondent UTA, had the burden to demonstrate that no genuine issue of material fact existed prior to the non-movant having to offer evidence demonstrating the existence of these disputes. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Of course, before it can be shown that no dispute about material facts exists one must identify the substantive standard that creates material facts. The respondents never identified a standard contrary to the twelve factor test. Thus, in their response to summary judgment in the district court the petitioners spent most of their efforts identifying the failure of the respondents to address the twelve factor test and directing the district court's attention to *Baltimore Sun Co. v. National Labor Relations Board*, and its clear explanation of the twelve factor test. 257 F.3d 419, 429 (4th Cir. 2001). Additionally, the lower courts had five affidavits from petitioners which spoke directly to factors within the twelve factor test. They particularly addressed geographical proximity, existence of or lack of common supervision, qualifications, skills and training and desires of the workers. All these factors favored a finding of a separate bargaining unit and were addressed in the affidavits and/or a petition with 63% of the TRAX employees requesting that they not be included in the same bargaining unit as the bus employees. At the oral argument on the summary judgment motion before the district court the twelve factor test was also raised. The following statement was the

most concise: "And we think that there has to be factual findings on all 12 of the factors and then there has to be a weighing of the twelve factors and weighing individual factors against each other." At the same oral argument, petitioners also stated that: "And we think this court is basically taking away our Seventh Amendment rights to a jury by making this determination without having a jury go through the 12 factor test and make factual determinations on each of the 12 factors." The petitioners stated in a filing before the Tenth Circuit panel:

> The NLRB has created a test for determining bargaining units that is the 'community of interest' test. *Baltimore Sun v. National Labor Relations Board*, 257 F.3d 419, 429 (4th Cir. 2001). In order to show that there was no dispute on a material fact, i.e., that the TRAX employees were within an appropriate bargaining unit, defendant UTA had to show that all the factors used in that test pointed in their direction. UTA had to show, by presenting evidence or by pointing to a lack of evidence by the plaintiffs after an adequate time for discovery, that no dispute existed.
>
> Of course, UTA could not satisfy this requirement since the plaintiffs had already presented evidence on two important factors in the community of interest test, i.e., that the TRAX employees had separate supervisors and separate facilities. *International Brotherhood of Electric Workers v. Aubrey, Jr.*, 42 Ca. App. 4th 861 (Ct. App. 2nd Appellate Dist., Div. 4 1996). These two factors alone in plaintiffs favor precluded the granting of summary judgment in this case since UTA's defense to all the claims was that it had negotiated with the appropriate bargaining unit. A reasonable jury could find for the plaintiffs on the

> issue just based on the two factors being in the plaintiffs' favor.

These passages concentrated on just two of the factors since these factors were critical in the *Aubrey* case. The accretion factors were not used by that court with the "community of interest test" due to the existence of common supervision and a common facility. *Id. at 871.* In the case at bar, the affidavits established the existence of separate supervision and a separate facility. While the respondents treat petitioners' arguments concerning accretion and the twelve factor test as if they are opposing arguments, in fact, they are to be considered together to decide upon the appropriate substantive standard to determine an appropriate bargaining unit. As stated by the court in *Aubrey:*

> Under the so-called accretion doctrine, groups of new employees can be added to an existing bargaining unit without holding a vote on their representation. (*N.L.R.B. v. Stevens Ford, Inc.* (2d Cir. 1985) 773 F.2d 468, 472.) The criteria used to determine whether this should be done include the usual factors considered in making appropriate-unit determinations. (Id. at p. 473; *Intern. Ass'n of Machinists v. N.L.R.B.* (9th Cir. 1985) 759 F.2d 1477, 1479.) Because no election will be held if an accretion is found, however, additional factors must first be considered: whether the new group of employees itself constitutes an appropriate unit; the size of the group to be accreted relative to the size of the existing unit; whether the group to be accreted was already in existence at the time the existing bargaining unit was recognized; the extent to which the existing unit is itself the result of

> prior accretions; and, of course, the views of the employees. (*Stevens Ford, supra*, at pp. 473-475.)

*Id.* at 872.

Respondent UTA also seeks to defend the lower courts' actions by citing to two sections of treatises that clearly do not apply. (Resp. at p. 18-19.) The first section involves the creation of an initial bargaining unit. (*Id.* at 18.) This case does not involve the creation of an initial bargaining unit. The bus employee bargaining unit has been in existence for decades, even by the admission of respondent UTA. (UTA Resp. at p. 3.) The NLRB grants companies and unions great deference in creating initial bargaining units. That is because no matter what is decided the workers will be given an opportunity to vote on the bargaining representative. Also, it does not upset an existing bargaining unit because the unit is just being created. This case involves the attempted addition or accretion of light-rail employees into the existing bus employee bargaining unit. In the accretion context, an attempt to impose a bargaining unit or force an accretion of employees into an existing bargaining unit is prohibited. *NLRB v. Paper Manufacturers*, 786 F.2d 1163 (3rd Cir. 1986) (Citing *Chas S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3rd Cir. 1985.))

The second treatise is also not applicable. The treatise section does not examine the impact that UMTA has on limiting the ability of a state to choose a bargaining unit. Respondent UTA continues to evade its responsibility to protect the basic rights that the employees previously had under the NLRA. This is a requirement to be eligible for federal funds.

## II. RESPONDENTS COMPLETELY IGNORE THAT PETITIONERS MADE A TIMELY RULE 56(F) MOTION THAT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT.

Respondents UTA and Local 382 also ignore that petitioners made a timely Rule 56(f) motion asking for discovery to better respond to the motion for summary judgment. One of the issues that petitioners requested discovery on was on the issue of whether Local 382 has majority support in either the bargaining unit Local 382 and UTA claim is appropriate or in the distinct TRAX division of UTA which the petitioners claim is the appropriate bargaining unit. The petitioners, by presenting a petition and affidavits supporting it to the district court and then the Tenth Circuit, with 63% of the TRAX employees objecting to Local 382, certainly placed that issue in question. Despite the Tenth Circuit recognizing that Utah Code Ann. § 17A-2-1031 requires that UTA bargain with a group representing a majority of the employees and the district court similarly recognizing that requirement, the lower courts did not find the petitioners' request for discovery on that issue to be important. (Pet. App. at 11a-12a; 29a-30a.) However, since the TRAX employees are the only ones that have majority support for their putative union, the continued refusal by UTA to bargain with a chosen representative of the TRAX employees is a clear violation of the statute. The refusal of the lower courts to grant discovery is just another example of the basic unfairness towards the Petitioners.[1]

---

[1] A further example of the lower courts treating the petitioners unjustly is the lower courts' treatment of a motion to amend that was timely filed prior to the issuance of the summary judgment decision. Respondent UTA is correct that "the case went up to the

Tenth Circuit on appeal without any resolution of the motion to amend." (UTA Resp. at p. 9.) The petitioners have similarly identified this deficiency. (App. Pet. at p. 6.) The Tenth Circuit Court's ruling suggests that the petitioners forfeited their ability to have their motion to amend heard by cutting off the district court's ability to rule by filing a premature appeal. (App. Pet. at 22a-23a.) Respondent UTA also seems to suggest that petitioners acted inappropriately. (UTA Resp. at 8-9.) However, this assertion is clearly contrary to established law. It is well established law that: "The denial of a motion by the district court, although not formally expressed, may be implied by the entry of final judgment (which is in effect an overruling of pending pretrial motions) or of an order inconsistent with the granting of the relief sought by the motion." *Addington v. Farmer's Elevator Mutual Co.*, 650 F.2d 663, 666 (5th. Cir. 1981) (citing *Agostino v. Ellamar Packing Co., 191 F.2d 576, 577 (9th Cir. 1951); Mosier v. Federal Reserve Bank of New York,* 132 F.2d 710, 712 (2nd Cir. 1942): see also *Cohen v. Curtis Publishing Co.*, 333 F.2d 974, 977 (8th Cir.), *cert. denied* 380 U.S. 921(1965)). The district court had a history of not ruling on petitioners' motions and they did not want to delay their ability to exercise their First Amendment rights. The petitioners did wait seven days to give the district court a reasonable opportunity to reverse its decision to close but believed that any attempt to persuade that court to re-open the case was an exercise in futility. In fact, if they had not filed within the thirty-day deadline they would have lost their ability to appeal. Thus, the petitioners acted reasonably with the belief that they needed to act quickly to get a review of their case and to prevent respondent UTA from placing even more impediments on the exercise of their First Amendment rights. For example, after the hearing at the Tenth Circuit Court, but before the decision was even entered, respondent UTA increased the restrictions on free speech and free association at the job site by threatening to fire anyone who even mentioned forming a new association to challenge the entrenched union. Thus, it is was unfair for the Tenth Circuit Court to hold that the petitioners lose their right to amend because an appeal was filed after a final

Thus, the Court should, at a minimum, reverse the granting of the summary judgment and remand this case to the district court to identify the substantive standard to be used for summary judgment and allow the petitioners to respond to a motion for summary judgment after the standard is established. However, the petitioners humbly request more of the Court. Despite the Court's ability to reverse the case based solely on the respondents' failure to demonstrate that their were no material facts in dispute due to the failure to identify a substantive standard, the petitioners implore the Court to consider all of the issues of law concerning summary judgment for the sake of judicial economy which is consistent with Tenth Circuit case law. *City of Timberlake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993) *cert denied*, 512 U.S. 1236 (1994). The petitioners, blue collar workers, lack the resources to engage in a war of attrition with the well funded respondents and request that the Court

---

judgment was entered. The Tenth Circuit Court should have treated the closure of the case as a denial of the motion to amend. This is particularly true in a case where the district court had a history of silently denying motions. Consequently, it should have remanded the case back to the district court for a decision on the amended complaint. A complete failure to justify a denial of a motion to amend is an abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). As stated by the Court in *Foman*:

> The grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rule.

*Id.*

decide the other critical legal issues in the case as well. As recognized by then Justice Rehnquist in *NLRB v. Magnavox Co.*, blue collar workers can become pawns between bureaucratic self-serving unions and management. 415 U.S. 322, 325 (1974) (J. Rehnquist concurring in part & dissenting in part.) Justice Rehnquist's opinion understood that blue collar workers typically lack the resources to litigate the protection of their rights. This is certainly true in the case at bar. The Urban Mass Transportation Act's guarantee of continuing bargaining rights for workers becomes meaningless if the Court affirms a decision that a company and an entrenched union can select the bargaining representative for employees assigned to new positions. *See* § 13(c)(2)(B), 49 U.S.C. § 5333 (b).

While the petitioners have largely been represented by one counsel, pro bono, at one time the combined number of attorneys representing the DOL, Local 382 and UTA was approximately twenty. Counsel for petitioners does not assert that his presentation to the lower courts was perfect. However, the lower courts were always presented with enough information to satisfy the requirements of Federal Rules of Civil Procedure that the merits be presented. The petitioners should have been given an opportunity to develop their case through discovery so the merits of their position would determine the outcome. As stated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962):

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome

and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Id.* (Citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

## CONCLUSION

The Court should grant a writ of certiorari to the petitioners. The petitioners have been deprived of due process by the lower courts. The Court should reiterate that lower courts should not misuse the summary judgment process to find ways to dismiss meritorious claims. The Court should also examine an important federal labor law statute to give uniform guidance to courts.

Respectfully Submitted,

Daniel G. Moquin
*Counsel of Record*
P.O. Box 2802
Tuba City, AZ 86045
(801) 671-1806

*Counsel for Petitioners*

April 2007